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CORPORATION

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALAN LEFORT, Derivatively on Behalf of  
OPENWAVE SYSTEMS, INC.,

Plaintiff,

v.

ALAN BLACK, ROGER EVANS, ANDREW  
VERHALEN, ALAIN ROSSMANN, CHARLES  
PARRISH, DAVID KRONFELD, REED  
HUNDT, CREDIT SUISSE FIRST BOSTON  
CORPORATION, ROBERTSON STEPHENS,  
INC., f/k/a BANCOSTON ROBERTSON  
STEPHENS, INC., and DOES 1-25, inclusive,

Defendants,

and

OPENWAVE SYSTEMS, INC., a Delaware  
Corporation, Nominal Defendant.

No. C-02-2465 VRW

DEFENDANT CREDIT SUISSE FIRST  
BOSTON CORPORATION'S REPLY  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS  
SHAREHOLDER DERIVATIVE  
COMPLAINT

Date: March 27, 2003  
Time: 2:00 p.m.  
Courtroom: 6, 17th Floor  
Judge: Hon. Vaughn R. Walker

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**I. INTRODUCTION**

Plaintiff admits he cannot satisfy the “contemporaneous ownership” requirement of Federal Rule of Civil Procedure 23.1 (“Rule 23.1”). Plaintiff’s admission forecloses any need for further inquiry and compels dismissal of *this* plaintiff’s action with prejudice. As the rulings of other federal courts which have dismissed shareholder derivative suits, after removal, for failure to comply with the pleading requirements of Rule 23.1 demonstrate, dismissal is required here.

Plaintiff asks this Court to ignore that precedent and remand this action, but there is no ground for doing so. Plaintiff does not dispute that this action was properly removed. Nor does he claim that this Court lacks subject matter jurisdiction. Plaintiff’s argument is nothing more than an attempt to transform his opposition into a late, and meritless, motion to remand, which the Court should reject.

**II. ARGUMENT**

**A. Plaintiff’s Action Should Be Dismissed, Not Remanded**

With the first sentence of his opposition brief, Plaintiff admits he does not satisfy Rule 23.1’s contemporaneous ownership requirement. In the Ninth Circuit, it is settled law that, where a plaintiff in a derivative action does not satisfy the requirements of Rule 23.1, the action should be dismissed. *Kona Enter., Inc. v. Estate of Bishop*, 179 F.3d 767, 769-770 (9<sup>th</sup> Cir. 1999). Plaintiff asks the Court to remand rather than dismiss this action, but no statute or precedent authorizes remand.

First, Plaintiff identifies no statute authorizing remand of this action, which is hardly surprising since none exists. By statute, remand may be ordered only for lack of subject matter jurisdiction or for “any defect in removal procedure.” 28 U.S.C. § 1447(c). Plaintiff does not claim that either ground for remand exists in this case.

Second, Plaintiff cites no case in which a court has remanded, rather than dismissed, an action for failing to meet Rule 23.1’s requirements. To the contrary, courts

1 routinely dismiss removed derivative actions that do not meet those requirements. *See, e.g.,*  
 2 *Venner v. Great Northern Ry. Co.*, 209 U.S. 24, 34-35 (1908) (dismissal, not remand, of  
 3 shareholder derivative suit for derivative plaintiff's failure to meet contemporaneous ownership  
 4 requirement of former equity Rule 94 was proper because court had jurisdiction over the action  
 5 based on diversity of the parties); *McCall v. Scott*, 239 F.3d 808, 815-16, 827 (6<sup>th</sup> Cir. 2001)  
 6 (affirming dismissal of breach of loyalty claim in shareholder derivative suit for failure to satisfy  
 7 demand requirements of Rule 23.1); *Starrels v. First National Bank of Chicago*, 870 F.2d 1168,  
 8 1169-72 (7<sup>th</sup> Cir. 1989) (affirming dismissal with prejudice of shareholder derivative suit  
 9 removed to federal court, where plaintiff failed to satisfy Rule 23.1's demand and "continuous  
 10 ownership" requirements); *Hazen v. Southern Hills National Bank of Tulsa*, 414 F.2d 778, 779  
 11 (10<sup>th</sup> Cir. 1969) (affirming dismissal of removed derivative action for failure to comply with  
 12 requirements of Rule 23.1); *Wesenberg v. Zimmerman*, 2002 WL 1398539, \*2-5 (D. Minn.  
 13 June 24, 2002) (dismissing removed derivative suit for failure to make demand under Rule 23.1);  
 14 *Faktor v. American Biomaterials Corp.*, 1991 WL 336922, \*10-11 (D.N.J. May 28, 1991)  
 15 (dismissing shareholder derivative suit removed on diversity grounds for "failure to comply with  
 16 the requirements of Rule 23.1"); *Recchion v. Kirby*, 637 F. Supp. 284, 289 (W.D. Penn. 1985)  
 17 (dismissing removed derivative action for failure to plead proper demand under Rule 23.1; Rule  
 18 23.1 "applies not only to action originally brought in federal court, but also actions removed  
 19 from a state court").<sup>1</sup>

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21 <sup>1</sup> Plaintiff implies that *Lewis v. Chiles*, 719 F.2d 1044 (9<sup>th</sup> Cir. 1983), supports remand, but that is  
 22 incorrect. In *Lewis*, the Ninth Circuit affirmed the dismissal of a shareholder derivative suit  
 23 when plaintiff lost his standing to prosecute the action. *Id.* at 1048. The Ninth Circuit explicitly  
 24 recognized that "[t]he Court's decision in *Hannah [sic] v. Plumer* . . . indicates that Congress has  
 25 the power to fashion rules of procedure which affect the manner in which state-created rights are  
 26 enforced in federal courts." *Id.* at 1048, n.4. The Ninth Circuit recognized that application of  
 Rule 23.1 may "close the door of the federal courts to suits by noncontemporaneous  
 shareholders," and that such shareholders may find redress in state court, *id.*, but the Court never  
 suggested that remand, rather than dismissal, was proper.

1 Third, the only support Plaintiff provides is a suggestion in Wright & Miller that  
 2 the remand statute should be construed so broadly as to permit remand of removed derivative  
 3 actions that do not meet Rule 23.1's requirements. To our knowledge, no court has followed this  
 4 suggestion. Neither have other commentators. *See, e.g.,* Fletcher Cyc. Corp. § 5981.20 (Perm.  
 5 Ed.) ("If it is treated as a procedural requirement, Federal Rule 23.1 will apply to cases removed  
 6 from a state to a federal court [on the basis of diversity]."); 10 Fed. Proc., L. Ed. § 25:15 (2003)  
 7 ("The contemporaneous ownership requirement of FRCP 23.1 applies to derivative actions  
 8 removed from state to federal courts where the action is removed on the basis of diversity, even  
 9 though the action is removed from a court in a state where there is no contemporaneous  
 10 ownership requirement similar to FRCP 23.1"). The United States Supreme Court and the  
 11 California Supreme Court recognize that federal rules governing shareholder derivative suits  
 12 control in the federal courts even if there are no comparable state law requirements. *Cohen v.*  
 13 *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 556 (1949) (stating in dicta that former Rule 23(b)  
 14 (governing shareholder derivative suits) may be given effect in a federal court even though state  
 15 law contains no comparable requirement); *Hogan v. Ingold*, 38 Cal.2d 802, 813 (1952) (stating  
 16 that former Rule 23(b) "is enforceable in the federal courts even in states which permit derivative  
 17 suits without such a showing.")

18 Moreover, to "read" the remand statute as liberally as Plaintiff proposes would  
 19 erase the important distinction between constitutional standing and prudential standing. Under  
 20 28 U.S.C. section 1447(c), an action may be remanded if the court lacks "subject matter  
 21 jurisdiction." A court lacks subject matter jurisdiction if the plaintiff does not have standing  
 22 under Article III of the Constitution to bring his claim in federal court. *See, e.g., Boyle v. MTV*  
 23 *Networks*, 766 F. Supp. 809, 817-18 (N.D. Cal. 1991)) (case remanded because plaintiff failed to  
 24 allege any personal injury and, therefore, lacked Article III standing); *Mortera v. North*  
 25 *American Mortgage Co.*, 172 F. Supp. 2d 1240, 1244 (N.D. Cal. 2001) (same); *Maine Ass'n of*  
 26 *Interdependent Neighborhoods v. Commissioner, Maine Dept. of Human Services*, 876 F.2d

1 1051, 1053 (1<sup>st</sup> Cir. 1989) (case remanded because plaintiff “did not fulfill the minimal,  
 2 constitutional requirements for standing” because its individual members “suffered no immediate  
 3 or threatened injury.”); *Coyne v. American Tobacco Company*, 183 F.3d 488, 496 (6<sup>th</sup> Cir. 1999)  
 4 (case remanded because plaintiffs failed to meet “minimal, constitutional requirements for  
 5 standing since they have not shown a particularized injury, or that their injury will be redressed  
 6 by a verdict in their favor.”)

7 In comparison, Rule 23.1 is one of a number of prudential standing requirements,  
 8 which Congress adopted to further limit “who may invoke the courts’ decisional and remedial  
 9 powers.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also*, *Franchise Tax Bd. of Cal. v.*  
 10 *Alcan Aluminum Ltd*, 493 U.S. 331, 336-37 (1990) (associating the “shareholder standing rule”  
 11 with prudential standing requirements). But Rule 23.1’s prudential requirements do not  
 12 implicate the federal courts’ subject matter jurisdiction under Article III. *First Hartford Corp.*  
 13 *Pension Plan & Trust v. United States*, 194 F.3d 1279, 1290 (Fed. Cir. 1999) (“The shareholder  
 14 derivative standing requirements of Rule 23.1 involve prudential limitations, not constitutional  
 15 limitations.”); *see also*, *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (noting a prudential  
 16 standing requirement is a “complementary rule of self restraint,” which is separate and “apart  
 17 from the jurisdictional requirement” of constitutional standing); *Lewis v. Knutson*, 699 F.2d 230,  
 18 236 (5<sup>th</sup> Cir. 1983) (holding “the constitutional limitation requiring an injury to satisfy the case  
 19 or controversy requisite goes to the Court’s jurisdictional *power* to hear the case, while the  
 20 prudential limitation goes to the Court’s administrative *discretion* to hear the case”) (emphasis in  
 21 original). As the cases cited above (p. 2) hold, dismissal, not remand, is the appropriate remedy  
 22 for lack of prudential standing.

23 **B. What A California Court Might Do In Response To A Later**  
 24 **Filed State Court Action Is Irrelevant**

25 Plaintiff wastes much time arguing that a California state court would apply  
 26 California Corporations Code section 800, and section 800’s exception to the contemporaneous



ownership requirement, to his derivative claims. It is far from settled whether a California court would either apply section 800 or determine that Plaintiff qualifies for its exception. Even Plaintiff admits that a California court's decision on what law to apply would depend upon that court's balancing of the interests at stake. Opp. at 5 citing *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4<sup>th</sup> 459 (1992). As for section 800's exception to the contemporaneous ownership rule, the only case discussing the exception states that it "is considered to be 'so encumbered with conditions and restrictions that it would appear to be virtually meaningless.'" *Gaillard v. Natomas Co.*, 173 Cal. App. 3d 410, 420 (1986) (quoting 2 Marsh, Cal. Corp. Law & Prac., § 14.31, p. 253). And, even if section 800's exception does have meaning, Plaintiff has not pleaded facts sufficient to satisfy its requirements. To actually qualify for the exception, he must make a motion and present admissible evidence. Cal. Corp. Code § 800 (plaintiff seeking to proceed with derivative action under exception to contemporaneous ownership rule must make motion, with "evidence, by affidavit or testimony," showing that he meets the exception's requirements).<sup>2</sup>

In any event, what a California state court may do in response to a derivative action brought by Plaintiff would be for that court to decide, based upon all the pleadings and evidence presented. To the extent Plaintiff seeks this Court's advisory ruling on those issues, his request should be denied. The only issue before this Court is whether this action should be dismissed because it fails to meet the requirements of Rule 23.1. The answer to that question is "yes."

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<sup>2</sup> Plaintiff erroneously states that CSFB agrees with him that no shareholder, other than corporate insiders, could have owned shares at the time the IPO price was set. Opp. at 5. CSFB's moving papers contain no statements regarding whether there are other shareholders, who owned shares prior to the pricing of the IPO, who have standing to bring a derivative action. Certainly the company had numerous shareholders prior to its IPO. Plaintiff presents no evidence supporting his claim that every one of those shareholders is a "corporate insider," and there is no reason to believe that is the case.

**III. CONCLUSION**

Because Plaintiff admits his inability to satisfy the pleading requirements of Rule 23.1, Plaintiff's complaint should be dismissed.

DATED: March \_\_, 2003

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